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Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, ET AL.,

Appellants,

—VS.—

TOWN OF HEMPSTEAD.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

Reports of Opinions in Courts Below

The opinion of the Trial Court is found in 19 Misc. 2d 176 and 189 N. Y. Supp. 2d 577.

The Appellate Division affirmed, without opinion (9 App. Div. 2d 941 and 196 N. Y. Supp. 2d 573).

The Court of Appeals allowed the appeal on the ground "that a constitutional question is involved upon the appeal" (8 N. Y. 2d 779 and 201 N. Y. Supp. 2d 789).

In the Court of Appeals there was a majority opinion (4 judges) and a dissenting opinion (3 judges), reported in 9 N. Y. 2d 101 and 211 N. Y. Supp. 2d 185.

Jurisdiction

The jurisdiction of this Court is conferred by the provisions of 28 United States Code Section 1257(2). The Court of Appeals of the State of New York is the highest

Court of that State and the order and judgment of that Court affirms the constitutionality of a statute which violates the due process provisions of the 14th amendment and the *ex post facto* and bill of attainder provisions of Article I, Section 10, Clause 1 of the Constitution of the United States.

On June 5, 1961, this Court entered the following order:

> "In this case probable jurisdiction is noted and the case is transferred to the summary calendar."

Statute Involved in This Appeal

Ordinance No. 16 of the Town of Hempstead, as amended on November 25, 1958, is set forth in full on pages 6-9 of the Transcript of Record. The pertinent text of this Ordinance is set forth in the Appendix of this brief (Exhibit 1) and will be quoted at appropriate places in this brief.

Questions Presented for Review

Appellants contend that Ordinance No. 16, as amended on November 25, 1958, violates the Constitution of the United States for the following reasons:

(1) The ordinance violates the due process clause of the 14th amendment because it confiscates and takes away appellants' property and business of excavating and selling sand and gravel without any payment therefor; and the ordinance is not sustainable as a proper exercise of police powers, there being no proof whatsoever of nuisance or danger to support the taking provided for in sections 4(h) and (j) of the ordinance.

(2) Appellants' right to excavate sand and gravel under water existing on their property was expressly adjudicated as a prior nonconforming use in 1956 litigation between the same parties; and to the extent that the 1958 amendment

directly overrules such vested rights obtained by the 1956 judgment the ordinance violates the due process clause of the 14th amendment. There is no evidence to support the reversal of the 1956 judgment by the 1958 legislation or the legality of the 1958 amendment under police powers.

(3) In providing both criminal (section 10) and non-criminal (sections 4(h) and (j)) punishment for doing acts (excavating an area covering 20 acres) which were done legally, openly and with judicial approval, the 1958 amendment to Ordinance 16 constitutes *ex post facto* legislation and is in the nature of a bill of attainder in violation of Article I, Section 10 of the United States Constitution.

Statement of the Case

The appellant Goldblatt is the owner of 38 acres of land located in the Town of Hempstead. The other appellant, Builders Sand & Gravel Corp. (all of whose shares of stock are owned by Goldblatt) was—until enjoined in this action—the operator of the business of excavating and selling sand and gravel taken from this acreage (R. 4). The property was purchased by Goldblatt's father in 1927 and the business of excavating and selling sand and gravel was carried on continuously from 1927 until 1959 when the judgment of injunction was entered (R. 80).

In 1928, only a year after operations began, the excavating had gone below water level and an artificial lake was created (R. 80) in some places to a depth of 40 feet below water level and averaging 25 feet in depth (R. 41). This body of water, therefore, was in existence for over 30 years and appellants' excavation operations had been carried on under this water for 30 years before the 1958 amendment of Ordinance No. 16. Excavating under water is accomplished by hydraulic dredging and is sometimes known as

"wet" excavation, as contrasted with "dry" excavating which is done above water level. Exhibits 6A, 6B, 6F, 6N and 6R introduced in evidence by appellee show appellants' dredging operations.*

The first regulations of the appellee-town covering sand and gravel excavating were made in 1945 when Ordinance No. 16 was originally enacted. These regulations required a 6 foot wire mesh fence and provided for such things as degree of slope and width of berm. Appellants built the 6 foot wire mesh fence topped by 3 strands of barbed wire which now *completely* surrounds appellants' entire property (7000 lineal feet) and appellants otherwise complied fully with the *regulations* of the 1945 Ordinance No. 16 and continued to conduct their underwater excavating and dredging until 1956 when the appellee-town decided to put an end to appellants' business.

No claim was ever made that appellants violated any of the *regulatory* provisions of the original 1945 Ordinance. Not only was no claim ever made in any court—or elsewhere—that appellants' activities were unsafe or constituted a nuisance and, as noted in the dissenting opinion below (R. 204) appellee conceded, upon the oral argument in the Court of Appeals, that it "does not contend that this condition [i.e. underwater excavating] amounts to a nuisance". As we shall presently show (*infra* pp. 25-35): there is no proof that appellants' activities were unsafe, hazardous or obnoxious. To the contrary, the record discloses a lack of any evidence whatsoever that there was ever a single accident, injury or harm to any child or adult on the prem-

* Photographs introduced by appellee (Exhibits 5A-5B and 6A-6U) are photographs of appellants' property and operations. Photographs introduced by appellants (Exhibits B1, B2 and F and G) are *not* photographs of appellants' property but are photographs of other sand pits in Nassau County which appellants introduced to show discrimination by appellee in enforcing the ordinance.

ises in the 31 years of continuous hydraulic operations by appellants.* And there is no showing that there is anything inherently dangerous in the nature of appellants' business or in the method of appellants' operations. The 7,000 lineal feet of six-foot chain link, wire mesh fence, topped by three strands of barbed wire (R. 82-85) which surrounds appellants' property is in excellent condition and has been continuously supervised and maintained by appellants (R. 84, 85).

There is no proof that there were ever any trespassers on appellants' property. The most that appellee Town showed was that there were two small depressions under these 7,000 lineal feet of wire (Exhs. 5A and 5B). There is no proof of how or when these depressions were made and there was no proof that anyone ever entered the premises through these two small openings. The statement in the trial court's opinion (R. 179) that there were "several holes under this fence, evidently dug by children" is unsupported in the record.

There is no evidence that any property damage was ever caused by appellants' operations to neighboring homes or property, nor that there is any current or potential danger to the surrounding property from appellants' hydraulic dredging, or otherwise. To the contrary, the uncontradicted affirmative testimony was that there had never been any "cave-in or tearing away of the bank" or slope of appellants' man-made lake (R. 121); and there was uncontradicted affirmative testimony that the slope or bank surrounding the water is "stable" (R. 122).

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* In its brief in the Court of Appeals appellee referred to an alleged drowning which is supposed to have occurred in 1944, before the Town required fencing. This is an off the record reference (see opinion, R. 206) and will be the subject of comment in our reply brief if appellee reverts to it in its brief in this Court.

Because appellants' activities were not legally subject to attack as a nuisance or the like, appellee's first attempt to terminate appellants' excavating business came in the form of an injunction action, brought in 1956 in the Supreme Court of New York (Nassau County) on the theory that appellants' excavating business violated the zoning ordinance of the appellee-town. After trial, judgment was entered for appellants (Exhibit 3 of Appendix) which expressly provided that appellants have the legal rights of "a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises * * * notwithstanding any ordinances of the plaintiff [appellee]".* The opinion written by the Court in that case (Appendix, Exhibit 2) stated:

> "I find that the defendants [appellants herein] are now and have been since 1927, conducting a prior non-conforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant a continuance of this non-conforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537."

The judgment roll in the 1956 litigation constitutes exhibit "D" in our case on appeal. The testimony in that case is exhibit "I".

In 1957, the appellee-Town brought a second action to enjoin appellants from operating a concrete-mixing operation in connection with their sand and gravel business. That litigation terminated in an injunction preventing appellants from engaging in the concrete business on the ground that it would constitute an improper extension of their non-conforming use (4 App. Div. (2) 970; appeal denied 4 N. Y. (2) 674).

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* No appeal was taken from this judgment.

In 1958, the appellee-town amended ordinance no. 16 to accomplish precisely what it failed to accomplish in the 1956 lawsuit, *viz*: the absolute prohibition of all underwater sand and gravel excavation by appellants. (See Section 4(h) of the Ordinance, discussed *infra*, pp. 13, 14.)

After the litigation of 1956 and 1957 just referred to and before the commencement of this lawsuit (in 1959), appellee-town prepared a drainage map in August 1957 (appellants' Exh. C) which shows the proposed use of appellants' property as part of the Town's plans for a drainage system for surrounding properties. The appellee-town engaged in conferences with appellants, looking forward to the taking of appellants' property by condemnation (Exh. A and cf. R. 331). This proposal to condemn and pay for appellants' property for the public purpose of drainage would have been a constitutional method of eliminating appellants' non-conforming use, adjudicated in the 1956 judgment. (See *Harbison* v. *Buffalo*, 4 N. Y. 2d 553, 564, 575 (1958); *Berman* v. *Parker*, 348 U. S. 26, 36; 10 Syracuse Law Review 214.) However, instead of exercising rights of eminent domain, the appellee-town amended ordinance no. 16 in 1958, doing away with underwater dredging (Section 4(h)) and then brought this third action, in 1959, to enforce the amended ordinance.

Since appellants admittedly operated the only underwater sand and gravel business in Hempstead—and in view of the 1956 and 1957 litigation and events just reviewed—it would appear that the 1958 amendment was directly aimed at them.* At the time the 1958 ordinance was enacted, 20 of appellants' 38 acres were admittedly under water.

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* Judge Van Voorhis finds (R. 204) that the 1958 amendment "was directed at this single operation" conducted by appellants.

Not only does the 1958 Ordinance prohibit all underwater excavating and not only does it directly overrule the 1956 judgment, but section 4(j) of the Ordinance (Appendix, exh. 1) requires appellants to refill the entire excavation (lawfully made 1927-1959) with "clean non-burnable fill". Approximately 1,000,000 cubic yards of fill have been removed in appellants' 30 year operations (R. 63) so that the cost of refilling would be approximately $1,000,000.

The 1958 amendments (Section 10) also provides for punishment by fine (of not more than $500) or imprisonment (for a period not exceeding six months) or both, for each offense; and provision is made that "each week's continued violation shall constitute a separate additional violation".

Appellants' removal of sand and gravel under water is admittedly in direct violation of the 1958 ordinance (section 4(h)) which prohibits such excavations and therefore, if the judgment below (which holds the 1958 Ordinance constitutional) is affirmed by this Court, appellants are not only prohibited "unconditionally and finally" from excavating and carrying on their business of "underwater dredging previously conducted on 20 acres of [appellants] property" (opinion of Van Voorhis, J., R. 203) but they are required (by section 4(j)) to spend $1,000,000 to fill the excavation lawfully created, under criminal penalties (section 10).

Appellants' first pleading (R. 11) raised the constitutional issues involved herein.

After trial, judgment was entered (R. 12-14) granting the injunction, based on a holding of constitutionality of the 1958 ordinance.

The judgment of the Trial Court was affirmed by the Appellate Division of the Supreme Court, without opinion (R. 194, 195).

The Court of Appeals affirmed. Both the majority and minority opinions expressly state that the main issue involved on the appeal was the constitutionality of Ordinance No. 16 as amended in 1958.

The first sentence of the majority opinion (4 judges concurring) states (p. 199):

> "The question raised is whether an ordinance of the Town of Hempstead regulating the defendants' business is confiscatory and in violation of the due process clause of both the Federal and State Constitutions."

The dissenting opinion (3 judges concurring) concludes that Ordinance No. 16 not only violates the due process clause of the 14th amendment of the United States Constitution, but also states (R. 203) that the ordinance "may well be regarded as oppressive, and condemned by the constitutional prohibition against ex post facto laws (U. S. Const., art. I, § 10)".

Further facts pertinent to the issues of law involved on this appeal will be stated in the discussion of such issues.

Summary of Argument

(I) Appellants admittedly have the legal rights of a prior non-conforming use which permits and authorizes appellants to excavate and sell sand and gravel taken from their property covering 38 acres, 20 of which are under water. This right of a prior non-conforming use was established in a 1956 lawsuit brought by the appellee against appellants for an injunction to prevent appellants from continuing their excavation business. A copy of the judgment in the 1956 litigation is attached to this brief as exhibit 3.

In 1958 appellee amended its Ordinance No. 16 to provide (sections 4(h) and (j)) that appellants may no longer do exactly what the 1956 judgment permits, to wit: excavating sand and gravel on appellants' property. This is absolute prohibition and confiscation of appellants' property and their vested, legal right to use (as a non-conforming use) the property for excavating and selling sand and gravel. This is a taking and wiping out of a prior non-conforming use, without due process, in violation of the 14th amendment (*Town of Somers* v. *Camarco*, 308 N. Y. 537; *Harbison* v. *City of Buffalo*, 4 N. Y. (2) 553; 44 *Cornell Law Q.* 450, 453).

The ordinance cannot be sustained as a proper exercise of police powers because the ordinance does not provide reasonable *regulations* governing excavating operations but to the contrary provides (sections 4(h) and (j)) for absolute termination of excavating and the refilling of the excavation legally made over a period of 30 years. Not *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80 (*regulations* of lodging houses) but *Pennsylvania Coal* v. *Mahon*, 260 U. S. 393 (prohibition of mining coal) governs this case on appeal. There is no evidence to support the *prohibition* of excavating as a valid exercise of police powers since appellants' excavating activities do not constitute a nuisance, danger or hazard to the community.

The constitutional method of accomplishing appellee's purpose of eliminating appellants' non-conforming use of excavating is by "eminent domain" (*Pennsylvania Coal* v. *Mahon*, 260 U. S. at p. 413). In any event, the purpose cannot be accomplished by "arbitrary fiat" (*Village of Euclid* v. *Amber Realty*, 272 U. S. 365, 389) represented by appellee's 1958 amendment to Ordinance No. 16, after appellee lost its 1956 litigation.

(II) Insofar as the 1958 amendment to Ordinance 16 directly overrules vested rights of appellants "established by a solemn judgment" (*Massingill* v. *Downs*, 48 U. S. 760, 768) obtained in 1956 (Appendix, exh. 3) the ordinance violates the due process clause of the 14th amendment.

(III) The 1958 amendment to Ordinance 16 is a legislative act directly aimed at eliminating appellants' property and business and provides both criminal penalties (fine and imprisonment, section 10 of Ordinance 16) and non-criminal punishment (sections 4(h) and (j)) for doing those acts (i.e. excavating over 30 years) which were legal when done. Accordingly, the 1958 amendment constitutes (a) a bill of attainder and (b) *ex post facto* legislation, both in violation of article I, section 10 of the United States Constitution (*Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277; *Ex parte Garland*, 4 Wall. (71 U.S.) 333; *U. S.* v. *Lovett*, 328 U. S. 303; *Flemming* v. *Nestor*, 363 U. S. 603).

THE ARGUMENT

POINT I

The 1958 Amendment of Ordinance No. 16 totally prohibits appellants' use of their land and excavating business and wipes out appellants' vested rights in their prior non-conforming use of excavating and selling sand and gravel which was adjudicated in the 1956 litigation. The Ordinance is not regulatory but prohibitory and confiscatory and constitutes a taking without payment and in violation of the due process provisions of the 14th Amendment.

The difference in the conclusions reached in the majority and minority opinions below is due to a difference in the interpretation given to the meaning and requirements of Section 4(h) and 4(j) of the ordinance, as amended in 1958.

The majority opinion adopts the unrealistic view that the 1958 amendments constitute only *regulations* of how appellants shall conduct their sand and gravel business. This opinion states that the 1958 amendments do *not* "proscribe" but "merely" regulate and provide "conditions" for "future operation" of excavating by appellants (R. 200). Based on this premise that the ordinance merely *regulates* appellants' activities, the majority opinion (citing *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, and *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, cert. den. 360 U. S. 902) reaches the conclusion that the ordinance is constitutional, as a proper exercise of the Town's police powers.

The minority opinion finds that the 1958 ordinance does proscribe and does prohibit all excavating of sand and gravel under the water located on 20 acres of appellants'

property and reaches the conclusion that this is a total taking and confiscation of property, without compensation (under the holding in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393) in violation of the due process clause of the 14th amendment.

The foregoing summary of the reasoning and *rationale*, expressly stated in the opinions below demonstrates that the crux of the main constitutional issue posed on this appeal is whether Ordinance No. 16 does prohibit or only regulates appellants' excavating activities. Since no compensation or payment is provided for, it would appear that if Ordinance No. 16, as amended in 1958, does "proscribe" then the ordinance is confiscatory and unconstitutional. Accordingly, we go directly to this main issue.

Section 4(h) of the 1958 ordinance (printed in full, R. 7-9) provides:

> "No excavation shall be made below two feet *above* the maximum ground water level at the site." (Emphasis added.)

It is agreed that the average depth of the water on appellants' property is approximately 25 feet *below* "maximum ground water level". It follows that there can be no denial of the essential fact that appellants' excavation has reached a point 27 feet *below* the level at which excavating is permitted by the ordinance, viz: "2 feet *above* • • • ground water level."

The point is so important in the analysis of the problem involved on this appeal that we ask the Court's indulgence to repeat this major factual situation in another way: Section 4(h), by its very terms, prohibits any excavation "*below* 2 feet above the maximum ground water level at the site". This is a clear and unambiguous statement that

all excavating *below* water level is prohibited absolutely. The indisputable and agreed fact is that appellants' operations are, on average, 25 feet *below* water level. Accordingly, Section 4(h) expressly makes illegal the continuation of any excavation under the water existing on appellants' property; and the judgment of injunction prohibits any future excavation since the "pit has been excavated substantially beyond points 2 feet above the maximum water levels" (R. 14).* Since the entry of judgment in July 1959, no excavation has taken place.

Not only does section 4(h) totally and absolutely prohibit all future excavation under the artificial lake, lawfully created on appellants' property over the period from 1927 to 1959, but section 4(j) of the ordinance (and the injunction which sustains the ordinance, R. 14) require appellants to fill the entire excavation under water, covering 20 acres, "with clean, non-burnable fill". Section 4(j) of the ordinance provides:

> "When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance * * * such pit or part thereof shall be immediately refilled with clean, non-burnable fill * * * and the premises after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads".

In view of the fact that appellants may no longer excavate their property under water (section 4(h)) and must also refill (section 4(j)) this entire excavation (cov-

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* We agree with the following statement of counsel for appellee (R. 16): "* * * approximately 20 acres are land under water with an average depth of approximately 25 feet * * * this is water *all below the maximum ground water* level." (Emphasis added.)

ering 20 acres) it is submitted that the following stated major premise of *"regulation"*, adopted in the majority opinion of Judge Burke, cannot be sustained (R. 200):

> "Neither the injunction granted nor the ordinance proscribes any future excavation. The injunction merely conditions future operations upon the issuance of a permit from the Town of Hempstead and the correction of certain violations of the ordinance."

The majority opinion also says (R. 200):

> "It is not the function of the courts * * * to determine the 'reasonableness, wisdom and propriety' of the regulations."

The opinion cites *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (a case involving *regulation* of trucks on highways); and also says (R. 200) that this Court has sustained *"regulatory"* provisions involving "preexisting uses", citing *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80 and *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370 (cert. den. 360 U. S. 902).*

The foregoing fundamental assumption of "regulation", is erroneous as a matter of law. Appellants *cannot* comply with sections 4(h) and (j) of the 1958 ordinance which prohibit all future excavation under water. The only way appellants can comply with the requirement of sections 4(h) and (j) is to desist and stop forever all future excavation. This is total prohibition, not "merely" regulation, of excavating activities. The statement of Judge Burke (R. 200) that the judgment of "injunction merely conditions future operation upon the issuance of a permit from the Town of Hempstead, and the correction

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* These cases are discussed *infra* pp. 18, 19.

of certain violations of the ordinance" is unreal and cannot be supported because (1) no permit will be issued until appellants comply with sections 4(h) and (j) which *prohibit* all underwater excavation and (2) appellants cannot correct "violations of the ordinance" except by not excavating under water.

The majority opinion does not cite or discuss the provisions of sections 4(h) or 4(j) of the ordinance. The majority conclusion is essentially based upon the principle that there is a presumption of constitutionality of regulatory legislation enacted under police powers to protect the community. In the first place, the 1958 ordinance is *not* regulatory and secondly, any presumption of constitutionality was overcome, see *infra* pp. 25-35.

The dissenting opinion of Judge Van Voorhis analyzes sections 4(h) and (j) which prohibit all underwater dredging and requires refilling, and comes to the conclusion (R. 203) that "the theory of 'regulation' cannot reasonably be sustained," citing the statement of Mr. Justice Holmes in the *Pennsylvania Coal* case, often quoted by this Court (cf. *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168, 184) that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."

Because the provisions of sections 4(h) and (j) of the ordinance are so clearly prohibitive of all excavation under water* appellee has resorted to the argument, adopted in the majority opinion (R. 200), that since 18 acres of appellants' property is not yet under water, the ordinance is not confiscatory with respect to the 20 acres under water. The majority opinion of Judge Burke adopting this thesis,

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* To the extent that appellee recognizes the prohibitory nature of sections 4(h) and (j) appellee is in disagreement with the majority opinion which proceeds on the premise that the ordinance is "merely" regulatory.

stated (R. 200, fol. 263): "There are approximately 18 acres which are available for excavation."

We believe the statement itself of the foregoing proposition refutes the propriety or reasonableness of the contention that because only 20 acres—a little more than half of appellants' property—is taken, it does not constitute a taking, in violation of the due process clause. Even assuming, *arguendo*, that appellants might conduct other activities on *other* portions (18 acres) of their property that would be no answer to the immediate taking of the 20 acres under water. Actually the assumption is inapplicable in our case because that part of appellants' property (18 acres) which is not already under water is used by appellants in the processing (i.e. washing and screening) and the storing of materials which are excavated from the acreage under water. Photographic exhibits (Exhibits 2, 6G and 6P) demonstrate the necessary and close interrelationship, in appellants' business, between the 20 acres where hydraulic dredging takes place and the remainder of the property (18 acres) adjoining the water, where processing activities take place.

Furthermore, the requirement of the ordinance (section 4(h)) that no excavation shall proceed to a depth lower than "2 feet above maximum ground water level" means that there can be no substantial excavation even on the 18 acres not yet under water, because these 18 acres are substantially at water level. Exhibit 3, a topographical survey plot of the site, shows that the 18 acres are so close to ground water level that no substantial excavation can take place under section 4(h) of the ordinance.

The argument that the taking of 20 acres is not a taking because appellants own 18 additional acres, is a *non sequitur*, erroneous in logic and in law.

Because appellee was unable to argue away the prohibitory and confiscatory nature of section 4(h) appellee argued in one of its briefs in the Court of Appeals,* that "the ordinance as applied to the defendants [appellants] is not confiscatory" because appellants might use or convert their property "into a recreation area with park and boating facilities and the like." Appellee concluded (p. 11 of its brief): "The ordinance does not appear to preclude that possibility." When appellants pointed out that this contention (a) overlooks the requirement of section 4(j) that the lake be refilled and (b) is contradictory to appellee's major—but false—premise that water is dangerous *per se* (see *infra* p. 29), appellee discontinued the argument in subsequent briefs.

We do not know whether appellee will resurrect the foregoing argument in this Court, but we restate it here to demonstrate the speciousness of any argument that there is any use, other than excavating, which can be made of appellants' property; and sections 4(h) and (j) which prohibit that only use is a complete taking, in violation of the 14th amendment.

The decisions in the *Saxl* and *Jacobs* cases (cited and relied on in the majority opinion, R. 200) are totally inapplicable because the ordinances involved in those cases "were truly 'regulatory' ordinances which did not operate to confiscate and prohibit absolutely" (R. 203). In the *Jacobs* case (5 N. Y. 2d 370, cert. den. 360 U. S. 902) the ordinance regulated the number of beds which could be put in hospital rooms of certain sizes. There was nothing in the ordinance which prevented the hospital from carrying on its business.

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* This brief was submitted in opposition to appellants' motion to appeal to the Court of Appeals (see 8 N. Y. (2) 779).

Likewise, in the *Saxl* case (328 U. S. 80) this Court sustained state legislation regulating and requiring an automatic sprinkler system in lodging houses in New York City. However, the ordinance in the *Saxl* case did not prohibit the business of conducting a lodging house.

Ordinance No. 16 wipes out and eliminates appellant's legal rights of their prior non-conforming use of their land to wit: excavating and selling sand and gravel taken from their property under water, and constitutes a taking without due process in violation of the 14th Amendment.

The 1956 judgment of the Supreme Court of the State of New York (Appendix, Exh. 3) adjudicated that appellants had a "prior non-conforming use in the conduct of a sand and gravel business" and the judgment provided that this business might be "carried on on the entire premises" of appellants—notwithstanding any ordinance of the plaintiff [appellee]". This legal right to continue a prior use which is in violation of zoning ordinances, has often been termed a "vested right" (*People* v. *Miller*, 304 N. Y. 105, 108).

The elimination of prior non-conforming uses which are considered objectionable by local communities, is a problem which has confronted communities throughout the United States and has been the subject matter of much judicial inquiry and review. The problem is reviewed extensively in *Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553 (1958), which cites much of the learning and decisions in New York and other states.

State and municipal legislation seeking to eliminate prior non-conforming uses has often been the result of "pressure groups" getting their views of civic planning adopted through local legislative bodies. (*Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553, 567.) We are not concerned, on this

appeal, with the social or economic factors involved in such legislation; nor do we dispute the salutary purpose expressed in the majority opinion of Judge Burke (R. 200) viz: "There must be progress" and sometimes "private interests * * * must yield to the good of the community". We are concerned, however, with the constitutional problem of payment for the taking of property occasioned by such legislation. The following statement of Mr. Justice Holmes in the *Pennsylvania Coal* case is applicable and pertinent to the *desideratum* stated by Judge Burke (R. 200) that "There must be progress":

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change" (260 U. S. at p. 416).

And Mr. Justice Holmes points out that the "constitutional way" is by the "exercise of eminent domain" (260 U. S. at p. 413).

In legislation enacted in states where the problem of eliminating non-conforming uses has been considered, provision has been made for amortizing the owner's investment and paying for the eliminated rights of prior use. See opinions in *Harbison* v. *City of Buffalo, supra.*

Ours is the only case we know of where a very substantial non-conforming prior use, established in litigation between the parties, has been eliminated—and thus far successfully —without any payment therefor. We know of no case where not only is the nonconforming use eliminated (section 4 (h)) but the ordinance requires (section 4(j)) the restoring of the property to its condition 30 years before—with criminal penalties provided for violations (section 10).

The learning on the subject is summarized in an article in 44 Cornell Law Quarterly 450 (1959) entitled "*Elimination of Nonconforming Use by 'Amortization'; Constitutionality of Municipal Ordinance*", in which the author concludes (p. 453): "The law is settled that retroactive zoning ordinances and ordinances requiring immediate cessation of prior nonconforming uses are unconstitutional because they are too harsh and unfair." See also: "*Amortization of Nonconforming Use Under Regulatory Guise*" (7 Syracuse Law Review 158).

In the case at bar, the trial court prohibited appellants from showing the total amount of their investment in their property and business (R. 119). Such evidence was admissible under the New York law established in *People* v. *Miller* (304 N. Y. 105, 108, 109) where the Court held that unless the loss to the owner of a prior non-conforming use is "slight and insubstantial" it cannot be constitutionally eliminated by ordinance. *Accord: Town of Somers* v. *Camarco*, 308 N. Y. 537, 539, 540 and *Harbison* v. *City of Buffalo, supra.* Fortunately, there is proof in the record in our case of the substantial nature of appellants' property, sufficient to demonstrate that appellants' business and investment are *not* "slight and insubstantial" and therefore constitute a taking, without compensation, in violation of the due process clause. Such evidence consists of the fact, first, that appellant Goldblatt is the admitted owner of 38 acres of real property located in Hempstead, Nassau County, often described by appellee itself as one of America's most prosperous and growing communities. Secondly, the judgment in the 1956 case (in which the same parties were involved) was marked in evidence in this case (exhibit "D"); and the transcript of the testimony in that case (exhibit "I"), shows that the gross annual business done by appellants was "in excess of $200,000 per year" and that capital investment of equipment and other property of

appellants used in their excavation operations was "approximately $241,000, excluding the value of the land itself".* Thirdly, although the trial court refused (R. 119) to permit appellants to develop fully the issue of investment and value of land and equipment, the court did permit testimony that the "assessed valuation" of appellants' "sand pit on the tax rolls of the County of Nassau" is $66,000 (R. 119); and assessed value in Nassau County represents only 35.88 per cent of true value (*Mid-Island Shopping Plaza* v. *Podeyn*, New York Law Journal, Aug. 12, 1960, Sup. Ct. N. Y., Nassau Co.).

Under the foregoing proof, showing very substantial investment by appellants in their prior nonconforming use, the judgment appealed from violates the well settled principle of constitutional law that a nonconforming prior use may not be eliminated without payment therefor. *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537; *Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553. See also *Arverne Bay Constr. Co.* v. *Thatcher*, 278 N. Y. 222, 231 and *People* v. *Calvar Corp.*, 286 N. Y. 419, 421. The applicable rule of law was stated in *Town of Somers* v. *Camarco*, 308 N. Y. 537, 541:

> "Generally, nonconforming uses and structures are constitutionally protected and permitted to continue, notwithstanding the attempted contrary provisions of a new or amended zoning ordinance, unless the resulting loss to the owner is relatively slight and insubstantial. *People* v. *Miller*, 304 N. Y. 105."

Ordinance No. 16 makes no provision whatsoever for payment or amortization of appellants' valuable and sub-

* The finding made by Mr. Justice Hill in the 1956 litigation is that appellants "have made such a substantial investment in improvements in the business to warrant the continuance of [their] nonconforming use" (Appendix, exh. 2).

stantial rights of their prior nonconforming use—adjudicated in 1956. Moreover, it would appear that a statute providing for amortization of a business (cf. *Harbison* v. *Buffalo, supra*) would be inapplicable in our case because appellants cannot move their excavating business to a new site, as the owner of another type business can, such as the junk business in the *Harbison* case.

The foregoing distinction between a prior nonconforming use consisting of a business located on the property and the use of the real property itself, is pointed out in the decisions of *Hadacheck* v. *Los Angeles*, 239 U. S. 394, and *Terrace Park* v. *Errett*, 12 Fed. 2d 240, 243, cert. den. 273 U. S. 710.

In *Hadacheck*, this Court (239 U. S. at pp. 411 and 412) expressly stated the difference between a prohibition of the use of one's land (the situation in our case) and the prohibition of a business located on the land—which business could be physically moved to another location. The *Hadacheck* case involved a brick-making factory located on property containing clay used in the making of the bricks. This Court, noting (p. 410) that in *Ex parte Kelso* (147 Cal. 609) a statute prohibiting the maintenance of a rock quarry within the City of San Francisco was held unconstitutional (as a prohibition against the use of the real property itself) pointed out that the legislation attacked contained "no prohibition of the removal of brick clay" (p. 411) but only prohibited the manufacturing of brick. This Court posed the *quaere* (p. 412) whether a total prohibition of removal of the clay from the property would be a violation of the due process clause, as was held in *Ex parte Kelso.*

When the *quaere* raised in *Hadacheck* was later litigated in *Terrace Park* v. *Errett*, 12 Fed. 2d 240 (C. A. 6, 1926; cert. den. 273 U. S. 710) it was held that an ordinance which prohibited further excavation of sand and gravel from

one's property was unconstitutional. The Court in the *Errett* case, citing the *Hadacheck* case, said (p. 243):

> "There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content. This difference was recognized by the Supreme Court in *Hadacheck* v. *Los Angeles,* 239 U. S. 394."

The opinion of Judge Burke was premised on "the presumption of constitutionality" (R. 199) arising from the regulatory provisions of Ordinance No. 16. We have thus far shown (1) that sections 4(h) and (j) are not regulations, but totally prohibit all underwater excavating on appellants' property and therefore the majority's reliance on a presumption of constitutionality of regulatory police power is erroneous; and (2) the ordinance—particularly 4(h) and (j)—violates the well settled principle of constitutional law that a nonconforming prior use cannot be constitutionally eliminated without provision for payment. The majority opinion found that Ordinance No. 16 does not "violate defendants' [appellants'] vested rights in an established nonconforming use" (R. 199) because it found the ordinance to be "merely" regulatory.

Although appellee's main theory of constitutionality of Ordinance No. 16 is alleged harm, evil or nuisance of appellants' excavation operations, the record contains no proof whatsoever to sustain any such theory. To the contrary, appellants' activities extending over a period of more than 30 years, have caused no injury to person or property and there was no proof of potential danger to person or property. Any presumption of constitutionality in the mere enactment of the ordinance has been overcome.

A basic contention of appellee, adopted in the majority opinion below, is that legislation must be sustained where "regulations" are "needed" to protect the community (R. 200). The majority opinion also says that "this record" demonstrates "a threat to the community's welfare" (R. 200). In addition to the fact that sections 4(h) and (j) are *not* regulatory, the fact is also that "this record" does *not* demonstrate any "threat to the community's welfare".

In *Town of Somers* v. *Camarco*, 308 N. Y. 537, the Court held that an ordinance prohibiting the continuance of a prior nonconforming use of excavating sand and gravel—the precise situation involved here—was unconstitutional as a taking without due process. By way of dictum the court noted that if the excavating operations constituted a "nuisance" then the situation might be different. The court said (p. 541):

> "We do not pass upon the question of what may be a proper exercise of the town's police powers so as to prevent the creation or maintenance of a nuisance on the premises of the defendants * * *."

In view of the fact that appellants have a legal, vested right to excavate under water on their property as a prior nonconforming use (which both the appellee and the majority opinion recognize) appellee argues "police powers"

in support of an affirmance of the judgment below. If the ordinance were regulatory and if it were shown that appellants' operations constituted a hazard, danger or nuisance, which required protection of police power legislation, then the validity of the ordinance might be shown. However (1) the 1958 ordinance is not regulatory and (2) there was no proof whatsoever that the conditions of operation of appellants' business were obnoxious or a nuisance to support the enactment of *prohibitory* legislation under the guise of police powers.

In connection with the observation made in the *Camarco* case, *supra,* viz: if the operations of a sand and gravel pit constitute a "nuisance", then legislation to "prevent the creation or maintenance of a nuisance" might be sustained, we note again the concession made by the appellee (R. 204) that it "does not contend" that appellants' excavating "amounts to a nuisance". The fact is that if appellants' operations constituted a nuisance or were hazardous, unhealthy or legally objectionable, the appellee-town could have sought an injunction in the 1956 litigation or in subsequent litigation to prevent appellants' operations; but appellee never brought any such action and in lieu thereof it amended Ordinance No. 16 which, by the stroke of a pen, accomplishes its purpose of terminating appellants' excavating business.

In addition to the concession made by appellee and noted in the opinion of Judge Van Voorhis (R. 204) that appellants' operations do not constitute a nuisance, the record in this case does not show any nuisance nor a single instance of any danger or hazard, present or potential, to person or property. There is not one instance of any injury to any person caused during appellants' 30 years of operations. There is not a single case of damage or danger to surrounding property. There was no proof of even one

trespasser on appellants' property completely surrounded by 7,000 feet of 6 foot wire mesh fence, topped by 3 strands of barbed wire. The banks and the slope of excavation are safe and there was never a single instance of a cave-in or the like or the threat of any cave-in.

Not only is the record free of any actual proof of danger, hazard or nuisance in appellants' operations, but there is no presumption that excavating sand and gravel constitutes a danger or nuisance, *per se*. To the contrary, the business of excavating sand and gravel is a highly important and legitimate industry.* The holding in *Somers* v. *Camarco*, 308 N. Y. 537, is a judicial recognition that excavating sand and gravel is a business protected by the law of prior nonconforming uses. Also the 1956 judgment (Appendix, exh. 3) recognizes the legitimate nature of this very underwater excavating by legally protecting it as a nonconforming use.

Although the appellee has never actually argued that sand and gravel excavating constitutes a danger or nuisance *per se*, and although appellee did not offer any proof whatsoever to show that appellants' operations constituted a dangerous or potentially dangerous operation, nevertheless in its briefs below appellee sought to create the im-

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*In 1956, Hon. Douglas McKay, the then Secretary of the Department of Interior of the United States, in an address made at the 40th annual conference of the National Sand and Gravel Association at Chicago, Illinois, on February 16, 1956, stated that the Association has "every reason to be proud of * * * the sand and gravel industry". He pointed out that for many years the sand and gravel industry was "second only to bituminous coal as the largest segment of mining industry in terms of production". Secretary McKay then went on to state that the new record of production of sand and gravel "elevated sand and gravel to first place in tonnage production of all minerals. The value of this output totaled almost a half billion dollars."

The 1959 statistics of the United States Bureau of Mines show that this business totaled more than $700,000,000 and more than $27,600,000 in New York alone.

pression that there is something malicious or obnoxious about sand and gravel excavating. For example, appellee has often referred to the excavation existing on appellants' property as a "huge sprawling crater". Likewise, appellee has consistently started its briefs with the unsupported statement that it is "common knowledge" that excavating sand and gravel is a dangerous enterprise. Appellee has also referred to "stagnant" water on appellants' property. This type of argumentation by epithet, and the use of scarehead terminology found its way into the opinion of the trial court which adopted some of the very language of appellee.* The fact is that it is *not* "common knowledge" that excavating sand and gravel is dangerous or hazardous *per se;* and in this case there is no proof to sustain this unfounded assumption, as we have seen.

Although appellee failed to prove that underwater or wet excavation is dangerous in this case, or dangerous *per se,* appellee's briefs have sought to create the impression that there is something bad or evil *per se* in the existence of the water located on appellants' premises. The unfounded assumption that a body of water is somehow inherently dangerous also finds its way into the majority opinion which recites that appellants' property "lies in the midst of a densely populated area".** The assumption

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* For example the trial court's statement (R. 183) that the artificial lake is "stagnant" comes from a statement found in appellee's trial brief and is not supported by the record. Since there is a continuous circulation of water caused by the very dredging operations (see exhs. 6G and 6P) and since the lake is fed by natural springs, the water is *not* "stagnant". The court also refers to the "huge sprawling crater filled with water" (R. 183).

** The objection to appellants' activities in this neighborhood was adjudicated against appellee in the 1956 litigation (Appendix, exhs. 2 and 3). As also noted by Judge Van Voorhis (R. 201): "Thus, defendants did not bring their business into a residential area; defendants' neighbors voluntarily came into this area where defendants' operations and the artificially created lake were evident and obvious."

that the mere existence of a body of water is dangerous is fallacious. Even when not surrounded by a fence, a body of water has been held to be *not* "inherently dangerous or a nuisance". See *Pope* v. *State*, 198 Misc. 31, 36, aff'd 277 App. Div. 1157; *Cunningham* v. *City of Niagara Falls*, 242 App. Div. 39, aff'd 269 N. Y. 644.

The recital in the majority opinion (R. 199): "Included within a radius of 3,500 feet are more than 2,200 homes and 4 schools with an enrollment of 4,500 children", is of no significance in support of the 1958 ordinance as a valid exercise of police powers. These statistics constitute no proof of "danger to the public" (*Panhandle* v. *State Highway*, 294 U. S. 613, 619) nor do they prove any need for abolishing all underwater excavating and filling the excavation (section 4(j)): Bodies of water, both natural and artificially created, exist throughout the United States, in populated and in rural communities. There exists in Central Park in New York City, a body of water, unfenced, and surrounded by thousands of homes, hundreds of schools and millions of children. In our case there was no proof of a single instance where the water on appellants' land caused injury or harm to a single child and there was no proof that this water constitutes a potential danger to the children living in the neighborhood. We have before noted that the water, as well as appellants' entire property, is completely fenced, the fencing is continually inspected and maintained, and there was no evidence of a single trespasser.

Drownings, of course, occur in lakes and bodies of water, both guarded and unguarded and both natural and artificially created. Yet that fact would not be justification for sustaining the requirement (section 4(j)) that the artificial lake here (covering 20 acres) be filled, any more than a

statute prohibiting automobiles would be sustained for the reason "that children as well as adults are occasionally injured or killed by them" (opinion of Van Voorhis, *J.*, R. 206).

In place of proof, the trial court and the majority opinion below repeatedly refer to "common knowledge" that there is danger *per se* in excavating sand and gravel and that water is dangerous, *per se*. The fact is that there is no such "common knowledge". The majority opinion (R. 200) says:

> "The hazards to both life and property accompanying the *uncontrolled* operation of these pits are common knowledge and this restraint need not await an event." (Emphasis added.)

No one will dispute the foregoing statement that excavating should not be an "uncontrolled operation".* However the statement does not support the legality of sections 4(h) and (j) of the 1958 ordinance which does not *control*, but *prohibits* all underwater excavating and puts appellants out of business.

Although appellee has argued that the 1958 ordinance is not a taking because it does not cause a prohibition of appellants' underwater excavating, appellee has also argued (p. 11 of its motion to dismiss made in this Court) that even if the ordinance results in a termination and prohibition of appellants' business by depriving appellants of their "only profitable use" (i.e. excavating) the ordinance is nevertheless constitutional, citing *Reinman* v. *Little Rock*, 237 U. S. 171; *Hadacheck* v. *Sebastian*, 239 U. S. 394; and *Pierce Oil* v. *City of Hope*, 248 U. S. 498. These cases (de-

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* Appellants' excavating is *not* an "uncontrolled operation". The property is fenced, supervised and maintained.

scribed as "extreme cases" by Mr. Justice Douglas in the *Saxl* case, 328 U. S. 80, 83) involved activities which were found, on demurrer, to be noxious, offensive and "productive of disease" (Mr. Justice Pitney in *Reinman* v. *Little Rock*, 237 U. S. at p. 178).

In the instant case, there is absolutely no proof whatsoever that appellants' operations are noxious, offensive, dangerous, a nuisance, or productive of disease.

Furthermore, the opinions in the *Reinman*, *Hadechek* and *Pierce Oil* cases point out that the noxious business could be physically moved elsewhere; and in the *Hadachek* case it was specifically pointed out that this Court was not prohibiting the taking of the clay out of the ground, but only the making of the brick from the clay. See our discussion of *Hadacheck*, *supra*, p. 23.

The *Reinman*, *Hadachek* and *Pierce Oil* cases were decided on motion or demurrer. In the *Reinman* case, the plaintiff demurred to the answer of the City of Little Rock which, in the words of Mr. Justice Pitney, had alleged that plaintiff's "stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease." Mr. Justice Pitney then said (p. 178):

> "Plaintiffs did not contradict this but demurred to the answer as insufficient in law and the case was heard in the trial court upon * * * the demurrer."

Likewise, the *Pierce Oil* case was decided on demurrer on pleadings which alleged that the storage of gasoline 300 feet away from dwellings was dangerous. Neither the *Reinman* nor the *Hadachek* nor the *Pierce Oil* cases are cited in Mr. Justice Holmes' opinion in *Pennsylvania Coal Co.* v. *Mahon*. The fact that Mr. Justice Holmes also wrote the opinion in the *Pierce Oil* case is significant.

Furthermore, in none of these "extreme cases" (Douglas, *J.* in 328 U. S. at p. 83) was there any affirmative requirement that not only should the business be enjoined but that the owner make an expenditure of approximately $1,000,000 (required in our case) to restore the business or premises to their original condition. We know of no case which makes any such affirmative requirement. Moreover, in none of these "extreme cases" had there been a previous adjudication, such as we have here (Appendix, exhs. 2 and 3) that the business involved was actually a legitimate and proper business; nor was there a judicial finding such as was made in the 1956 litigation that appellants were "entitled * * * to continue their operations, *in futuro*, as to the entire premises" (Appendix, exh. 2). To the contrary, the business was enjoined in each of the cases cited by appellee because of the finding that it *was* a danger or a nuisance in the community.

Additionally, there remains serious doubt whether the appellee-town has the legal power and authority to enact a *prohibitory* ordinance, such as we have here. Ordinance No. 16 recites (R. 6) that it is enacted "pursuant to the provisions of Section 130 of the Town Law of the State of New York", which delegates the power to the appellee-town only to "*regulate*", not prohibit, "excavations and sand pits". Section 130, subd. 23 of the Town Law authorizes only the enactment of ordinances "*regulating* the * * * removal of materials from, filling up, draining, cleaning, operating and using any lands or other premises for sand and gravel pits * * * and prohibiting the use of any lands or other premises * * * which do not comply with such *regulations*". (Emphasis added.)

The argument of appellee itself, made in the Court of Appeals, that appellants might use the water on their premises for boating and swimming by children—after

the termination of appellants' excavating activities—is directly contrary to the theory also advocated by appellee that water is dangerous *per se*.

We have seen that the majority opinion below relies on the presumption of constitutionality. The 1958 amendment to Ordinance No. 16 recites (R. 6) that the amendment prohibiting all dredging under water and requiring the refilling of the excavation was purportedly enacted "to remove the danger to health and life caused by deep excavations remaining in the ground". This recital, made by the appellee-town after it lost its 1956 litigation which sought to shut down appellants' business, was overcome by the proof in this case that there was no danger.

The facts in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, were much stronger in support of the exercise of police power than in the case on appeal. In that case a Pennsylvania statute prohibited coal mining under dwellings and public places. The legislation was upheld as a proper exercise of police powers by the highest court of Pennsylvania which pointed out (274 Pa. 489) that the legislation was enacted on the findings of the Pennsylvania legislature and the governor who signed the bill that "lives have been lost, homes, churches and schools destroyed and an ever present peril has threatened the morale of the entire community." The Pennsylvania Court further stated that mining under dwellings, which was prohibited by the legislation, had been declared by the legislature "to be a public nuisance."

This Court reversed the Pennsylvania Court, holding that the statute was unconstitutional as applied to a coal company which had sold to the defendants the land and house on its property but had reserved the right to mine and remove coal. This Court held that the legislation was not

a valid exercise of police powers despite the legislative recitals and despite the finding of the trial court that the proposed mining of coal "would cause damage" to defendants' homes and despite the recognition in this Court's opinion (p. 416) that such mining would constitute a "danger" to defendants' property. This Court concluded that the prohibition of mining was a taking in violation of the due process clause of the 14th amendment and specifically stated that the recitals in the legislative proceedings of danger was insufficient to sustain the constitutionality of the legislation. And this Court further stated that if the State wished to eliminate the purported nuisance, the constitutional method was "eminent domain and compensation to sustain the act" (260 U. S. at p. 413).

The 1958 amendment to Ordinance No. 16 certainly demonstrates a strong desire of the appellee to get rid of the excavating business of appellants which had legally been conducted for over 30 years. We must repeat the answer to such desire, given by Mr. Justice Holmes in the *Pennsylvania Coal* case (260 U. S. at p. 416):

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Recently it was reported (New York Herald Tribune, July 18, 1961) that Nassau County has begun "condemnation proceedings to acquire land for a 275 acre county park and golf course" which was previously used for excavation of sand and gravel. The property is reported to belong to the Colonial Sand and Stone Company, Inc. This constitutional method of condemning a sand pit in the same county where appellants' property is located, should

be used if the appellee-Town desires to eliminate appellants' excavating business. As we noted above, there were actual discussions between the Town and appellants concerning the condemnation of appellants' property, but negotiations were terminated when the Town decided to rely on the presumption of constitutionality of legislation as a basis for the 1958 amendment.

The 1958 Amendment to Ordinance No. 16 was aimed directly at appellants' property and activities and was enacted for the special and particular purpose of eliminating appellants' excavating business which had been previously carried on lawfully and continuously for over 30 years.

Inasmuch as appellants' excavating business, and particularly its excavating by the hydraulic method under water, was admittedly the only operating sand and gravel operation in the Town of Hempstead at the time the 1958 amendment was enacted, the statement of Judge Van Voorhis (R. 204) that the 1958 amendments were "directed at this single operation and designed to accomplish what the 1956 lawsuit had failed to do, viz: to destroy a lawfully preexisting use under the Town Zoning Ordinance" is fully justified.

If the judgment below is affirmed, not only will appellants forever be barred from future excavation operations, but the requirement (Section 4(j)) of refilling the excavation, from which 1,000,000 cubic yards of fill have admittedly been removed, is so onerous and costly that appellants could not afford to do the refilling (estimated at $1,000,000)* and pay the taxes on the property. Hence,

* There was testimony that 1,000,000 cubic yards of fill would be required to restore the property to its 1928 condition (R. 63). The estimate of $1,000,000 is based on the current price of $1 per cubic yard for "clean" fill required by section 4(j).

appellee-Town will end up by owning the property, without paying anything therefor.

To the extent that appellants "now conduct the only sand and gravel business by dredging in Hempstead * * * it would appear that the ordinance was aimed directly at them" (Van Voorhis, *J.*); and since there is no showing that the excavation activities now are different from, or more dangerous than the operations conducted over the 32 year period (1927 to 1959), the holding in *Dobbins* v. *Los Angeles,* 195 U. S. 223, is pertinent. In the *Dobbins* case, property was purchased by the plaintiff in September for the purpose of erecting a gasworks on the property which was within an area in which a gasworks was permitted. Two months later, the City enacted an ordinance prohibiting the erection of a gasworks within that area. This Court pointed out (p. 239) that there was no showing that there had been any change in "conditions" involving the erection of the gasworks between the time of the purchase of the property (September) and the enactment of the ordinance (November); and held that the ordinance was directed against plaintiff's business and property. The Court said (pp. 235, 236) that although "every intendment is to be made in favor of the lawfulness of the exercise of municipal power making legislations to promote the public health and safety" nevertheless the ordinance could not be sustained as a proper exercise of police powers because there was no showing that the public health or welfare required the ordinance (p. 239). The legislation directed at plaintiff's property was held invalid as a "taking of property without due process of law" (p. 241).

POINT II

The 1956 judgment directly adjudicated, in an action between the same parties to this litigation, that appellants have the legal right to continue their underwater excavating business on their entire premises. The 1958 Amendment to Ordinance No. 16 which directly prohibits what the 1956 judgment permits, is unconstitutional to the extent that such legislation overrules vested rights obtained by the 1956 judgment.

The decision in the 1956 litigation between the parties,* and the judgment entered thereon (Appendix, exhs. 2 and 3), expressly provide that appellants have the legal right to continue their prior non-conforming use in the conduct of their sand and gravel business "which may be carried on on the entire premises * * * notwithstanding any ordinances of the plaintiff [appellee]".

At the time of the 1956 litigation, in which appellee sought to enjoin appellants' excavating business, Ordinance No. 16 was in effect. Until it was amended in 1958, the ordinance was *regulatory*, providing for the fencing of the property, the degree of slope, the width of berms, etc. Appellants have never and do not now challenge the fact that their business is subject to reasonable regulations; and appellants complied with all of the *regulatory* provisions of Ordinance No. 16 enacted in 1945. In the 1956 litigation the Town never raised the issue of whether appellants were violating Ordinance No. 16, nor did they claim that underwater dredging by appellants constituted

* The parties in both cases are the same. The defendant East Meadow Realty Corp. (all of whose stock was owned by appellant Goldblatt) in the 1956 lawsuit (Appendix, exh. 3) was the prior record owner of the land, title to which is now in appellant Goldblatt.

a danger or nuisance. These latter issues could have been tried in the 1956 litigation, but appellee chose not to do so.

Appellee did not appeal the 1956 judgment but accomplished the same purpose as a reversal on appeal by enacting the 1958 amendments which expressly provided that appellants could no longer do exactly what the 1956 judgment said they could do, to wit: excavate under water.

In answer to this point II of appellants, appellee has argued that no constitutional issue of due process is involved because the 1956 litigation involved only the Town's zoning ordinance whereas this appeal involves the exercise of police powers in the enactment of the 1958 ordinance changes. This argument proceeds on the mistaken theory that there is a dichotomy between cases involving zoning ordinances and other cases involving police power. The argument loses sight of the fact that zoning regulations are also based on the proper exercise of police power. *Village of Euclid* v. *Ambler Realty*, 272 U. S. 365.

If there had been a change in operations between the time of the 1956 judgment and the 1958 amendment of Ordinance 16 and if such change brought about a condition of nuisance or hazard to the community then the argument might be pressed that such new circumstances made the 1956 judgment no longer effective to give appellants' rights specifically acquired therein i.e. the right of excavating on 20 acres under water. But there were no new or different conditions in appellants' excavation operations between 1956 and 1958.

Certainly the record does not support any basis for concluding that the appellee-Town, which had lost its 1956 lawsuit, could constitutionally call on police powers to reach a decision contrary to the 1956 judgment. Judge Van Voorhis has described the situation accurately (R. 204):

> "• • • an examination of the clauses in the 1958 amendments to Ordinance No. 16 supports the contention that it was • • • designed to accomplish what the 1956 lawsuit failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance. The object [of the 1958 amendment] is not to promote public health or safety, but to end the operation of this business under the guise of regulation."

To the extent that the 1958 ordinance directly overrules and does away with vested rights which appellants obtained in the 1956 judgment, the ordinance violates the due process clause of the 14th Amendment. The applicable law is stated in *McCullough* v. *Virginia*, 172 U. S. 102, 123:

> "It is not within the power of a legislature to take away rights which have once been vested by a judgment."

In *Massingill* v. *Downs*, 48 U. S. 760, 767, this Court said:

> "No legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment."

See also *Germania Savings Bank* v. *Suspension Bridge*, 159 N. Y. 362, 367, 368; *Waddey* v. *Waddey*, 290 N. Y. 251; and *Hoyt Metal* v. *Atwood*, 289 Fed. 453, 454, 455 (C. A. 7, 1923).

POINT III

To the extent that Sections 4(h) and 4(j) of the 1958 Ordinance impose civil and property penalties on the appellants in requiring them to stop all business operations and to refill an excavation covering 20 acres which was legally made over a 30 year period; and to the extent that the Ordinance also provides that failure to comply with these Sections of the Ordinance subject appellants to serious criminal penalties of fine and imprisonment (Section 10 of the Ordinance), the Ordinance constitutes *ex post facto* legislation and is a bill of attainder in violation of Article I, Section 10, Clause 1 of the United States Constitution.

Article I, Section 10, Clause 1 of the United States Constitution provides:

> "No state shall * * * pass any * * * Bill of Attainder, *ex post facto* Law, * * *"

Section 10 of the 1958 amendment of Ordinance 16 (R. 8) provides for fine up to $500 and imprisonment not exceeding 6 months for each violation and further provides that "each week's continued violation shall constitute a separate additional violation".

The minority opinion below finds the 1958 ordinance unconstitutional, not only in violating the due process clause of the 14th Amendment, but also because it violates the constitutional provision against *ex post facto* legislation.* Judge Van Voorhis wrote (R. 203):

> "While in a proper case the distinction is a valid one, the record here indicates a systematic attempt to

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* The majority opinion does not consider the issue of *ex post facto* legislation.

force the defendants out of business. The decision below has that practical effect. A condition of continuing the business requires defendants to fill the existing excavation at a cost in excess of $1,000,000. If this is not done, the ordinance purports to render defendants criminally liable for separate misdemeanors during each week until the pit is refilled. This particular portion of the ordinance, we may note, in addition to other objectionable features, serves, in effect, to render criminal an act innocent when done (*People* v. *Oliver*, 1 N. Y. 2d 152, 158). In consequence, it may well be regarded as oppressive, and condemned by the constitutional prohibition against *ex post facto* laws (U. S. Const., art. I., § 10). In other words, under the challenged ordinance as it now stands, defendants are susceptible of criminal prosecution for not filling in the excavation (to the extent of approximately 1,000,000 cubic yards) lawfully created over the years prior to enactment of the ordinance, by means of the lawful removal of sand, and in the course of prosecuting a lawful business."

The undisputed facts are: (1) the excavation and creation of the artificial lake, was done legally and openly (2) the artificial lake was created as early as 1928 and (3) the excavation work received the judicial sanction of the Supreme Court of New York in the 1956 litigation. From the foregoing it would seem to follow that (1) the 1958 enactment of criminal punishment (fine and imprisonment) for the doing of those acts (viz: digging and creating a lake), which were legal when performed (2) as well as the non-criminal penalty of putting appellants out of business (sections 4(h) and (j)) constitute *ex post facto* legislation.

The trial court held—erroneously, in our opinion—that the defense of *ex post facto* legislation was not available, stating (R. 182):

"Obviously, such a defense has no place in this civil trial; that doctrine applies only to criminal cases (citing cases)."

As far back as 1878, this Court (*Burgess* v. *Salmon*, 97 U. S. 381) held that a statute may violate the prohibition against *ex post facto* legislation, where only civil sanctions of the statute were involved.

The statute in the *Burgess* case provided for both criminal (fine and imprisonment) penalties as well as civil sanctions. The issue was thus stated by this Court (97 U. S. at p. 382):

"The case presents but a single point: can a manufacturer be punished, criminally and civilly,—*civilly* here,—for the violation of a statute, when the statute was not in force at the time the act was done? (Emphasis added.)

The holding of the Court was as follows (p. 384):

"To impose upon the owner of the goods • • • a penalty of $377, for not paying an additional tax of four cents a pound, would subject him to the operation of an *ex post facto* law.

"An *ex post facto* law is one which imposes a punishment for an act, which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. *Carpenter* v. *Commonwealth of Pa.*, 17 How. 456.

"Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an *ex post facto* law."

See also: *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277 and *Ex parte Garland*, 4 Wall. (71 U. S.) 333.

Recent decisions of this Court demonstrate that the prohibition against bills of attainder is *not* limited to punishment consisting of the classic criminal sanctions of fine and imprisonment but also includes punishment involving forfeiture or loss of civil and property rights. *Flemming* v. *Nestor*, 363 U. S. 603; *United States* v. *Lovett*, 328 U. S. 303; *DeVeau* v. *Braisted*, 363 U. S. 144; *Trop* v. *Dulles*, 356 U. S. 86.

The *Flemming* case involved Article I, Section 9 of the Constitution which prohibits Congress from enacting *ex post facto* laws and bills of attainder. Although the majority opinion (in which 5 judges concurred) held that the statute depriving a deportee of social security benefits was not unconstitutional, there appeared to be no difference in the majority and dissenting opinions in the view that the prohibition against bills of attainder and *ex post facto* laws includes legislation which deprives one of property rights. The difference in the majority and minority opinions in that case was based on the issue whether the particular legislation was "aimed at the person or class of persons disqualified" (p. 614) or, on the other hand, whether the legislation merely regulated "activity or status from which the individual is barred". The majority opinion written by Judge Harlan held the legislation was not "aimed" at the appellee and therefore held the statute not *ex post facto* legislation or a bill of attainder.

In our case, the 1958 amendment was certainly "aimed directly at [appellants]" who "conduct the only sand and gravel business by dredging in Hempstead" (Van Voorhis, J. at R. 202). Accordingly, it would appear that under both the majority and minority opinions in the *Flemming* case, the civil penalties in our case (sections 4(h) and (j))

of Ordinance 16—let alone the criminal sanctions (section 10)—constitute *ex post facto* legislation and a bill of attainder.

Mr. Justice Douglas, reviewing prior holdings of this Court, stated the following which applies to our case (363 U. S. at pp. 629, 630):

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *Cummings* v. *Missouri*, 4 Wall. 277, 323.
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> • • • • •
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> "Punishment in the sense of a bill of attainder includes the 'deprivation or suspension of political or civil rights.' *Cummings* v. *Missouri, supra,* at 322. In that case it was barring a priest from practicing his profession. In *Ex parte Garland,* 4 Wall. 333, it was excluding a man from practicing law in the federal courts. In *United States* v. *Lovett,* 328 U. S. 303, it was cutting off employees' compensation and barring them permanently from government service. *Cutting off a person's livelihood by denying him accrued social benefits—part of his property interests—is no less a punishment.* Here as in the other cases cited, the penalty exacted has one of the classic purposes of punishment—'to reprimand the wrongdoer, to deter others.' *Trop* v. *Dulles,* 356 U. S. 86, 96." (Emphasis ours.)

In our case on appeal, the non-criminal provisions of Ordinance No. 16, to wit: Sections 4(h) and 4(j), provide punishment of appellants for doing acts which were legal when done and constitute legislation which inflicts the punishment of totally depriving appellants of their property and business of excavating.

In the *Lovett* case, 328 U. S. 303, 315, the Court, after reviewing *Cummings* v. *Missouri*, 44 Wall. 277 and *Ex parte Garland*, 4 Wall. 333, said the following (p. 315):

> "Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, *no matter what their form*, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." (Emphasis added.)

To the extent that the 1958 amendment provides punishment for acts previously done which were legal when done, it violates the prohibition against *ex post facto* legislation; and to the extent that it provides punishment consisting of the taking away of appellants' business and property "by legislative fiat" (Douglas, *J.* in *Flemming* v. *Nestor*) it constitutes a bill of attainder.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

MILTON I. NEWMAN
Counsel for Appellants

EMIL N. BAAR
JOHN J. BENNETT
EDWARD M. MILLER
of Counsel

APPENDIX

EXHIBIT 1

Pertinent Provisions of Ordinance 16

Section 4(h) of Ordinance No. 16, as amended on November 25, 1958, provides:

> No excavation shall be made below two feet above the maximum ground water level at the site.

Section 4(j) provides:

> When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance or the removal of earth from any such part has been discontinued or abandoned or the permit for such removal has expired, such pit or part thereof shall be immediately refilled with clean, nonburnable fill containing no garbage, refuse, offal or any other deleterious or unwholesome matter and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads.

Section 10 provides:

> Penalties. For any and every violation of the provisions of this Ordinance, the owner, general agent, or contractor of a building on premises where such violations have been committed or shall exist, and the lessee or tenant of any part of the premises in which part of said violation has been committed or shall exist, and the general agent, architect, engineer, surveyor, building contractor or any other person who knows, permits,

takes part or assists in any such violation, or who maintains any premises in which any such violation shall exist, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than $500.00 or imprisonment for a period not exceeding 6 months for each such offense, or by both such fine and imprisonment. Each week's continued violation shall constitute a separate additional violation.

EXHIBIT 2

Opinion in Prior Litigation

Dated March 8, 1956

TOWN OF HEMPSTEAD,

—v.—

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.

By this action plaintiff, Town of Hempstead, seeks an injunction restraining defendant from the operation of a sand and gravel business on premises described in the complaint as a violation of the town zoning ordinance. Defendants' counterclaim for a determination that the ordinance is invalid insofar as it restrains them from the operation of a sand and gravel business on the premises.

Defendants or their predecessors have owned and conducted a sand and gravel business on the 38 acre parcel described in the complaint since 1927. The first zoning ordinance of the town was adopted in 1930. I find that the defendants are now and have been since 1927 conducting a prior non-conforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant the continuance of this non-conforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537.

I, further, find that there has been a substantial use of the entire premises to entitle defendants to continue their operations, *in futuro*, as to the entire premises.

The complaint is dismissed and the counterclaim granted insofar as it seeks a determination that the prior nonconforming use can be carried on on the entire premises with costs to defendants.

The foregoing constitutes the decision of the court pursuant to the provisions of the Civil Practice Act.

Settle Judgment.

HILL
J.S.C.

EXHIBIT 3

Judgment in Prior Litigation

At a Special Term, Part I thereof, of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Nassau County Courthouse, Old Country Road, Mineola, New York, on the 5th day of April, 1956.

Present:

HON. L. BARRON HILL,

Justice.

7006/54

TOWN OF HEMPSTEAD,

Plaintiff,

—against—

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.,

Defendants.

The issues in this action having duly come on to be heard before this Court at a Special Term, Part I thereof, held at the Nassau County Courthouse, Mineola, New York, on the 14th and 15th days of February, 1956, and the plaintiff having appeared by John A. Morhous, Esq., by Edward M. Kolbell, Esq., of counsel, and the defendants having appeared by Edward M. Miller, Esq., and the allegations and proofs of the respective parties having been duly heard and considered, and the Court having made its decision

in writing, dated March 9, 1956, and having in its aforesaid decision directed the dismissal of the complaint and having granted judgment to the defendants on the counterclaim insofar as it sought a determination on the non-conforming use, with costs to the defendants, and the costs and disbursements of the defendants being the sum of $78.38, as taxed by the County Clerk of the County of Nassau, and on motion of Edward M. Miller, attorney for the defendants, it is

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same hereby is dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants have a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises described in the complaint, notwithstanding any Ordinances of the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, of Newbridge Avenue, East Meadow, New York, recover of the plaintiff, of Town Hall, Front Street, Hempstead, New York, the sum of $78.38, costs and disbursements, as taxed, and that the defendants have execution therefor.

Judgment this 5 day of April, 1956.

Enter

HILL
Justice Supreme Court